No. 3749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD and D. W. DAVIS,

Appellees.

APPELLEES' REPLY TO SUPPLEMENTAL BRIEF FOR APPELLANTS.

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APPELLEES' REPLY TO SUPPLEMENTAL BRIEF FOR APPELLANTS.

The supplemental brief for appellants is to a great extent a repetition of the matters set forth in their

opening brief. Counsel claim that appellees have accused them of omitting certain facts. Such accusation was made. In their opening brief counsel for appellants stated that the Benowa put into San Francisco in distress but no reference was made to the fact that the Master informed the owners that the vessel was short of provisions. In our opening brief we stated that it was necessary for the crew to furnish their own provisions during the time that they were in port at San Francisco, with the exception of five or six days, during which period certain supplies were furnished by the Pacific Motorship Company (apostles p. 63). Counsel for appellants refer to appellees' brief in which we are charged with drawing a pitiful picture of the straits in which libelants were left by their inability to collect their wages promptly. We have quoted the facts as they appear in the record and the facts speak for themselves, and any picture thus apparent in the mind of counsel for appellants is a reflection of the cold facts.

Counsel for appellants cite the case of *Petterson v. U. S.*, 274 Fed. 1003, to support the claim that this particular crew consisted of men belonging to a different class from that of the ignorant seamen whose rights courts of admiralty have been accustomed to consider. It is the first time that such an argument has come to our attention. The members of this crew were as human as the ignorant seamen to which counsel refer; their needs were just as pressing, as we have already stated, they were

strangers far from home. This crew, as has been pointed out, arrived in S. F. February 28th, 1921, having left Baltimore January 21st, 1921, and had no funds whatsoever. It became necessary for the Master to personally advance small amounts to various members of the crew (apostles p. 72).

The record clearly shows that the men received credit from a Wholesale Grocery Company in San Francisco for their provisions, and that they had received nothing whatsoever save in one or two instances where a small advance was made to one of the members of the crew to be sent to his wife prior to the arrival of the vessel in San Francisco. The credits which are given to the account of the vessel, or the owners, are for supplies obtained by the men from the slop chest on board the vessel. The record shows that these men all came from the eastern section of the United States, and were signed on at Baltimore, Md. Counsel lay particular stress upon the fact that the Shipping Articles show that one of the members of the crew was born in California. It does not appear, however, that he later moved to the east coast. It may be as counsel says that several of the members of the crew have remained in San Francisco, as there are several of the crew who did not accept the compromise offered to them. Several of them are still here waiting for a final determination of their claims. On page 37 of their brief counsel say that a majority of the crew accepted their wages June 2nd, the date the final decree was filed. We have no knowledge

other than from the satisfaction or releases which are on file in the lower court. These settlements having been made directly with the libelants and without notifying their counsel. How desperate the needs of those men, what arguments were used with them to persuade them to forego those rights which the lower court held them entitled to claim, we have no means of knowing. They may have returned from other voyages, but that does not alter the fact that they were depending upon the wages due them for their expenses and the necessaries which the owners failed to provide them with upon their arrival in San Francisco; nor does it relieve the owners of their agreement to provide transportation for them to the port of shipment, so that presumably they could be at their homes where they could receive such assistance as might be available.

Counsel for appellants claim that there is nothing in the record to show that the libelants were ignored. Our opening brief clearly sets forth the portions of the record relating to the treatment that the crew received, and how they were forced to obtain credit for provisions without any assistance whatsoever from the owners of the vessel, by agreeing that the cost of these provisions should be deducted from such money as they might obtain in this proceeding; also that they were ordered to leave the vessel in a strange community where they had neither families nor friends, and this without their receiving the wages for which they had worked and which they were entitled to receive.

If the representatives of the Pacific Motorship Company never had any conversations with the crew, it was because these representatives avoided taking the matter up with the crew, or with anyone in their behalf. This is clearly shown by the testimony of Shipping Commissioner Mr. Walter McArthur (apostles pp. 83-84) and Patrick Baird, accountant for the Pacific Motorship Company (apostles p. 194).

Counsel for appellants have cited the case of *Vincent v. U. S.,* 272 Fed. 889, in support of a contention that the receipt of the full wages up to the date of the tender was a waiver of any penalty for the intervening period. We cannot agree with this construction. The court properly ruled that the master without sufficient cause refused to pay the appellees, and we are also of the opinion that the payment which was made on their arrival at San Francisco of full wages should have been credited as part payment of the penalty provided for in the statute, as was stated in the recital of facts preceding the opinion.

The court further found that the appellees were entitled to payment as penalty under Section 4529 of the Revised Statutes * * * double pay from March 4th to April 26th, and that having been already paid single pay if they were awarded by the court double pay for the same period, the result would be that they would be thrice paid, and that equity and justice required no more than the payment of double wages covering the period of de-

fault. We submit that the tender referred to here by the appellant (see page 45 apostles) neither expressly nor by implication waives any rights which the appellees may have had to further prosecute their claims for the additional wages which they are claiming. This tender did not cover the amount due at the date it was made for the reason that libelants were entitled to double pay from the time that their wages became due, and in addition to this fact, the libelants had been supplying their own provisions from a time approximating 5 days after their arrival in the port of San Francisco (apostles p. 63).

Counsel for appellants cite the case of the *Pacific Mail Steamship Company v. Smith,* 241 U. S. 245, as holding that a shipowner has the right to contest his liability for the penalty and to delay the payment of the penalty while this contest is pending, without incurring additional penalties, but even that pending such contest in regard to the penalty he may delay the payment of the wages themselves. This case goes no further than to hold that the shipowner has a right to delay the payment of wages and the penalty which attaches for non-payment of wages *pending an appeal from the decree of the District Court.*

Counsel for appellants have repeated in their supplemental brief the misstatement made in their opening brief that libelant's proctor agreed that the penalty should cease to run on May 17th. Such an agreement was never made. We repeat: It was sug-

gested by Judge Neterer because he was leaving for Seattle, and the decree was not in a form which was agreeable to him. Counsel for claimant at that time objected to the delay that would ensue in preparing and forwarding a new decree to Judge Neterer at Seattle. The reason that Judge Neterer made this suggestion was that he was aware of the desperate position of the crew at that time, and he knew that in case of an appeal from the decree the crew might obtain the straight wages then due them and leave the question of the double wages to the Circuit Court of Appeals for final determination. The result desired by Judge Neterer would have put it beyond the power of the appellants to trade on the desperate financial condition of the crew and attain what, we think, amounted to an unconscionable advantage over those unfortunate men with whom, by the releases filed in court, they have settled for amounts less than actually due.

We submit that the matter set forth in the apostles, pages 239 to 242, contains no statement that an agreement was made by proctor for libelants that the penalty should cease. Rather, it confirms our own contention that the entire matter arose out of the suggestion made by Judge Neterer.

It has been our contention from the first that the double pay should run from the time the court found the payment of wages was refused until the entry of the final decree, and for that reason we could not in justice to our clients stipulate that it should cease. Had the court actually decreed that

the double pay should cease upon a specified date, as the court might have done had he been so advised, we would not have been asked to so stipulate, but this was entirely a matter for the court to decide, and as the court did not specify in its opinion that double pay should cease on May 17th, it was not for us to stipulate as to any date from which prior to the date which we then contended, and ever since have so contended, they were entitled to receive double pay, viz.: the date of the final decree.

Counsel for appellants attempt to distinguish the statute which was in question in the case of *Covert v. British Wexford,* 3 Fed. 577, from this by stating that the statute there in force was fundamentally different from our R. S. 4529. The principle of the statute there construed is the same as the present statute in force. Here, Congress has seen fit to extend the time within which additional wages are to continue, subsequent to the refusal of payment of wages due, and the same principle as to liquidated damages would apply whether the time were to run 10 days or 100 days. The members of this crew were kept waiting for wages rightfully due them and compelled, in the meantime, to subsist as best they could. Were the course of appellants approved in this case, unprincipled owners would soon seize upon the expedient of abandoning their crews in similar situations and after tiring them out, or to put it baldly, after starving them out, settle with them for the least possible amount regardless of their rights. Counsel for appellants state that no spe-

cific suggestion is made as to what steps Pacific Motorship Company should have taken, or as to just who would have accepted an hypothecation of security for a lien. This is a matter that rests with the Pacific Motorship Company and cannot be shifted upon the crew or their counsel who had no voice whatever in the management of the company.

The libelants had the first lien against the vessel and they could look to the vessel itself. If the holders of a mortgage had an interest to protect, it rested with them to see that this prior lien was paid. This is the same duty which a holder of a mortgage on real property has—that is, to satisfy a prior lien in order to protect his own interests if the occasion arises. When Mr. Gerber purchased the mortgages existing against this vessel, he knew that the libel was pending. A business man, as we must assume Mr. Gerber to be, would not purchase a mortgage against a vessel with prior liens upon her, unless in his judgment that vessel was worth more than the amount which was being paid for her plus the value of any prior liens that were outstanding.

Counsel for appellants again refer to the alleged assignment which they claim to have made to Ira S. Lillick, as attorney for the libelants, but this matter has been fully covered on pages 33, 34 and 35 of our opening brief. It is now claimed that this alleged assignment fully acquitted the Pacific Motorship Company from any further responsibility to

the crew—yet the facts disclose that no release from the demands of the crew was requested at the time this order on the Navy Department was given and if at the time it was given it was not delivered under a misapprehension as to the right to execute it, which is the charitable assumption, it was given as a means of working a fraud. This latter assumption we have never drawn as we believe Mr. Comyn believed he was arranging to collect the balance due for the freight, which, if the attempt were successful would have terminated the dispute.

Counsel for appellants rely upon the fact that the claim made upon the Navy Department called for the sum of $10,395.83 due the crew. This amount was to cover wages up to the time that they were due, together with transportation, and any additional amounts that may have been due under the articles, or by reason of the non-payment of the wages at the time they were due. This amount was not objected to by Mr. Comyn, the representative of the Pacific Motorship Company, nor would this amount have been paid, but was only to have been withheld subject to the amount due the crew being paid out of said sum. No objection was ever made by the Pacific Motorship Company as to the amount due the crew, and their only claim was that they did not have funds with which to meet the payroll presented to them. In fact the payroll was presented to the receiver and to the attorneys by the master and officers of the crew as the Pacific Motorship

Company had no records other than those they obtained from the master of the vessel.

We have pointed out in our original brief answers to the claims of counsel that excessive claims were made by the crew. We submit that the record shows that at no time did the owners of the vessel tender the amounts due to the members of the crew. The tender of April 27th was not the amount due upon that date. The court so found. The answer of the receiver referred to by counsel denies that libelants are severally, or otherwise, or at all, entitled to wages from the date of shipping and sailing of said vessel to the date of said libel (see Article 4, apostles p. 23).

Counsel for the appellants have referred to the case of *The "Moshulu"* decided by Judge Dooling and state that the mortgage of the Shipping Board involved therein was not a preferred mortgage. This is not a correct statement. The United States claims that the mortgage is a preferred mortgage. It was drawn for, and accepted as such, a preferred mortgage but the document was introduced in evidence at the hearing of said case and is now in the custody of the United States district clerk as an exhibit. It speaks for itself. In that case the vessel was sold under a libel filed in behalf of the crew, and the money was paid into the registry of the court. If the penalty had continued until the entry of the final decree, there would not have been a sufficient amount to pay the other lien claimants. There is nothing in the record to show that this would have been the

result had the "Benowa" been sold. The fund upon which claims could be made against the "Moshulu" was fixed, while in this case the value of the "Benowa" has not been determined. We must assume therefore that in view of the fact that W. E. Gerber, Jr., purchased the interests of the mortgagor of the "Benowa" subject to the rights of claimants holding prior liens that said motorship "Benowa" is of a value equal to or greater than the sum total of the then existing valid lien claims against her.

On page 24 counsel for appellants state that Mr. Gerber's interest is primarily as assignee of the claim of the Australian Government for the amounts set forth therein. Counsel claim that Mr. Gerber is in no way responsible for the failure of the Pacific Motorship Company to pay libelants. That may be true, but the libelants are entitled to the respective amounts due them against the owners, and if the owners do not pay said amounts, they have a lien against the vessel, and anyone claiming under any subsequent lien must necessarily become liable for the payment of any liens prior to the claim of the mortgagee.

Counsel claim that the amount of penalty is computed incorrectly. The decree was submitted to the court, and such objections made as counsel for claimants desired to make, and any objections could have been presented to the court. We submit that the method adopted by the counsel for libelants was correct in that the pay of the members of the crew is

computed by taking one-thirtieth of the amount of their monthly wages as the basis for computing the daily wage. The statute provides double pay for each day payment is withheld, without sufficient cause.

Counsel for appellants claim that we concede the point that it was improper to enter a decree for the sale of the vessel under a junior libel, without consolidating it with earlier libels. This is absolutely untrue. We did refer to the fact that upon suggestion of Mr. Thatcher that other libels were pending Judge Neterer requested counsel for libelants to notify other claimants because this suggestion was made. Messrs. Thatcher & Wright appeared before the court and made objections upon the grounds that there were other libels. Mr. Resler of Mr. Denman's office which represented certain interests was notified as was also the office of Messrs. Goodfellow, Eells, Moore & Orrick.

Any of the claimants having prior rights could have appeared in the action and made such objections as they deemed necessary to protect any interests which they may have had in the vessel at the time proclamation was made in this case but none appeared save the Commonwealth of Australia (apostles p. 27).

The record shows that when the various demands for wages were upon the master of the motorship "Benowa" and the owners and/or agents of the vessel that no objection whatever was raised as to the amount of wages due the men. Mr. Baird the ac-

countant for the Pacific Motorship Company testified that the Pacific Motorship Company had no money to pay the crew and that was the only reason they were not paid (apostles pp. 196-197).

Mr. Baird also testified that when Mr. Moran the purchasing agent of the Pacific Motorship Company made up the payroll that he obtained it from the ship (apostles p. 196).

Captain Kenny the master of the vessel testified that the only reason for not paying the wages was that the company was without funds (apostles p. 70).

The affirmative defense set up in the answer of claimant sets up the same defense (apostles pp. 24-25). As a matter of fact, the record shows that when the question of wages and/or the furnishing of provisions was taken up the officers and/or representatives of the owners of the "Benowa" avoided and refused to discuss the subject with the United States Shipping Commissioner Walter McArthur (apostles pp. 193-194).

The testimony of Captain Renny shows conclusively that continual demands were made upon him by the crew for wages and for provisions and that in turn he directly and through the United States Shipping Commissioner made demands upon the owners and representatives of the owners for wages and provisions for the crew and there is not an iota of evidence to show that any question was raised as to the amount due the respective members of the crew.

In the schedule attached to the libel the amounts set opposite each libelant's name include an amount covering wages due, transportation to Baltimore, subsistence and wages enroute and this is the entire basis of the claim that the crew were making excessive demands. We submit that this claim is not supported by the record but on the contrary it clearly shows that this question was never raised in the lower court other than by the general denial in the answer that the wages claimed were not due. There is no special defense pleaded raising this question and the first time this contention was made was in the briefs filed in this court.

The appellants have cited the case of *The Express,* 129 Federal, pages 655-656, as authority for claiming that it is necessary to allege that the delay in payment of wages was without sufficient cause. The portion of the opinion in reference to this point appears on page 656 wherein the court says:

> "In the first place, the libel does not allege any facts showing that the refusal was without sufficient cause."

The question arose in that case as to whether or not the men had a right to arbitrarily leave the ship and the court in deciding the case against the libelants held that there were no facts showing that the refusal was without sufficient cause. In this case, we have introduced in evidence the shipping articles and made the allegations as to the voyage and have clearly alleged that the men were entitled to their wages in accordance with those shipping articles.

Counsel for appellants contend that when admiralty has jurisdiction as, for instance, in a suit on a maritime lien, it will exercise that jurisdiction with regard to the property rights of all parties, whether or not they may have maritime liens, but it is well settled that it is only after the maritime liens have been satisfied that the court will consider claims which do not constitute a maritime lien against the res. It is also well settled that any maritime claimants may petition for any remnants or proceeds that are left after the lien claims have been satisfied.

The Conveyor, 147 Federal Rep. 586.

Counsel have contended that the filing of this libel was premature. We call to the attention of the court the case of the *Annie Smull,* Federal Cases No. 423, in which the court in its opinion on pages 984 and 985 says:

> "After some conflict of opinion the clause in the act, 'and the cargo or ballast be fully discharged', has been construed by the courts as being applicable only 'to those cases in which, either by express terms of the contract or by the established custom of the port, the crew are bound to stay by and unload the ship, and are actually retained in service for that purpose'. But where there is no such contract or usage, the wages become due on the day of the termination of the voyage—the seaman's discharge —and he is entitled to process against the vessel on the eleventh day thereafter—the ten days being computed from the termination of the voyage, when the wages become due without reference to the discharge of the cargo or ballast. 2 Conk. Adm. 48.

> It does not appear that there was any contract in this case, to stay by the ship until the cargo was discharged, or that there is any established custom requiring the seamen to do so, and ten days having elapsed from the ending of the voyage before the issuing of process, this exception is not well taken and must be disallowed."

The facts in this case come within the law as decided in the above case. The statute now in force is two days instead of ten days (Sec. 4529, Revised Stats. U. S.). The crew demanded their wages both prior to and at the time that it was decided that San Francisco was to be the port of discharge. This was decided, on or about March ninth or tenth; as it appears in the testimony of R. J. Spencer, the first mate, that on March 12th tugs came alongside the vessel to bring it to California City for discharging its cargo.

In the case of *"The Mary"*, Federal Cases 9191, the court held that whether the seamen are bound to remain by the vessel after the voyage is ended and assist in discharging the cargo depends on the custom of the port. The appellants have failed to show that it is the custom of the port for the crew to assist in discharging the cargo, and there is no provision in the Shipping Articles requiring this to be done. We must, therefore, assume that the failure to produce testimony to that effect is an admission that there is no such custom in the port of San Francisco.

In the case of *The "Catalonia"*, 236 Fed. Rep. at pages 555 and 556 the court in construing the Shipping Articles stated in its opinion:

> "The master's contention would make the articles too indefinite as to the extent of the voyage; and the same could be avoided for uncertainty and ambiguity, if such an interpretation should be placed upon them. Such view might operate unfairly to the seamen, who belong to a class who are ever entitled to the consideration of a court of admiralty; and, moreover, as between themselves and the master, the articles should be construed liberally in their favor, since the same were the product of the master, and not of themselves."

We respectfully submit that the decree of the lower court must be affirmed.

Dated, San Francisco,
December 28, 1921.

IRA S. LILLICK,
Proctor for Appellees.

J. ARTHUR OLSON,
Of Counsel.